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Supreme Court, U.S.
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No. 00-1639

In The

Supreme Court of the United States

JOSEPH G. PASTOREK, II, M.D.,

Petitioner,

v.

MERVIN L. TRAIL, M.D., ALLEN COPPING, D.D.S., THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, CAROLYN ELKINS, SURVIVING SPOUSE AND EXECUTRIX OF THE ESTATE OF THOMAS E. ELKINS, M.D.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF FACTS

This matter stems from a review of the clinical practice of Dr. Joseph Pastorek at facilities owned and operated by the LSU Medical Center in New Orleans. Specifically, LSU reviewed nineteen individual cases called to its attention by its department chair, Dr. Thomas Elkins, and by Pastorek's immediate supervisor, Dr. Harvey Gabert. All the cases under review by LSU were patients referred to Dr. Pastorek by a community practitioner, Dr Annelle Blanchard, with whom petitioner had been involved in a lengthy extra-marital affair. The gravamen of the complaint by Drs. Elkins and Gabert was that petitioner had repeatedly performed high-risk obstetric consultations which had provided Dr. Blanchard the perinatal supervisory support to perform diagnostic therapeutic and surgical procedures without acceptable documented indications.

In the course of a lengthy and detailed review by a specially appointed *ad hoc* committee, it was decided to engage Dr. Gary Cunningham of the Southwestern Medical Center at Dallas to review petitioner's practice in regard to the cases at issue. The lower court found:

> The August 21, 1995 report by Dr. Cunningham concluded that plaintiff had engaged in "some very questionable obstetrical practices:"
>
> > After careful review of these documents, I conclude that Dr. Pastorek indeed engaged in some very questionable obstetrical practices. These center around the use of tocolytics in pregnancy before 20 weeks, and in some cases, in the first trimester. There is

> implicit approval of HUAM (home uterine activity monitoring) and subcutaneous terbutaline therapy given by pump in some of these woman (sic). There is also implicit approval of an inordinate number of cervical cerclage done by a community practitioner and it is difficult for me to believe that Dr. Pastorek was not aware of these excessive procedures.

App. 28-29.

Beyond the Cunningham review, LSU's Chancellor, Dr. Mervin Trail, authorized yet another independent, outside review, this time by the American College of Obstetricians and Gynecologists (ACOG). The lower court found:

> After reviewing the charges and interviewing ten individuals, the ACOG team found that of the nineteen cases reviewed, two clearly represented a level of care which fell beneath acceptable standards both in terms of management and in documentation of medical records. Only one case was found satisfactory by the team in both management and documentation. The remaining sixteen cases were considered unsatisfactory because of the lack of adequate medical record documentation.

App. 30.

Neither Dr. Cunningham nor the ACOG panel considered anything even remotely related to any issue regarding whether Pastorek could or should testify, in any regard, to any panel at East Jefferson General Hospital ("EJGH").

The peer review proceeding to which Dr. Pastorek refers in his petition had absolutely no bearing on LSU's decision to terminate Pastorek's employment. That proceeding was conducted at EJGH and centered around the obstetrical practice of Dr. Annelle Blanchard and of her inordinately high rate of cervical cerclage surgery. That extensive review process culminated in five days of hearings which commenced on January 3, 1995.[1] The EJGH review resulted in the termination of Dr. Blanchard's privileges at EJGH.[2]

In August of 1993, during the initial stages of the EJGH review, petitioner requested that Dr. Elkins review a number of Dr. Blanchard's patient charts. Dr. Elkins enlisted the aid of another LSU professor, Dr. Joseph Crapanzano,[3] to assist him in the review of Dr. Blanchard's charts. Drs. Elkins and Crapanzano determined that Dr. Blanchard's practices regarding cerclage surgery and her prescription of Home Uterine Activity Monitors and terbutaline pumps to allegedly "high-risk" pregnant patients was "out of step with expected obstetrical practice . . . . "[4] Dr. Elkins then learned that Dr. Pastorek had served as Dr. Blanchard's perinatal consultant on a majority of the cases which he and Dr.

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[1] EJGH hearings were held on January 3rd, 5th, 17th, 26th and February 16th, 1995.

[2] EJGH hearing transcript, Sealed Exhibit 107 to Doc. # 397, R. 0324.

[3] Dr. Joseph Crapanzano was, at that time, a member of the LSU OB-Gyn faculty for over thirty-five (35) years.

[4] Exhibit F (Supp.R. 0125); the affidavit of Dr. Crapanzano referencing the subject report of Drs. Elkins and Crapanzano & Exhibit G/Appendix; Supp.R. 0126.

Crapanzano had reviewed.[5] Dr. Elkins had become aware that Dr. Blanchard was referring patients allegedly requiring monitors and pumps to a company in which she held an ownership interest.[6] Dr. Elkins also became aware that Dr. Pastorek had been involved in an extra-marital affair with Dr. Blanchard since 1984.[7]

Drs. Elkins and Gabert instructed Dr. Pastorek to stop providing perinatal consultations for Dr. Blanchard on at least five (5) separate occasions, commencing in December of 1993.[8] At the direction of Dr. Robert Daniels, then Dean of the LSU School of Medicine, Dr. Elkins requested that Dr. Pastorek resign from the LSU faculty in December of 1993.[9] Dr. Pastorek refused to resign.

In the Fall of 1994, Dr. Crapanzano notified Dr. Elkins that EJGH was requesting that an LSU physician testify at the EJGH hearings involving Dr. Blanchard.[10] Dr. Elkins had also been informed that Dr. Pastorek had allegedly

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[5] Dr. Elkins' deposition of May 11, 1998 (Exhibit B; Supp.R. 0054), page 131, line 19-page 132, line 18.

[6] Dr. Elkins' deposition of May 11, 1998, pages 204-205; Exhibit B; Supp.R. 0054.

[7] Dr. Pastorek's deposition of 01/18/99, p. 66, 67, 70; Exhibit P *in globo*; Supp.R. 0150.

[8] Dr. Gabert's deposition of 3/9/98, pages 277-278, 284 (Exhibit I; Supp.R. 0128); Dr. Elkins' deposition of May 11, 1998, pages 134, 137-138; (Exhibit B; Supp.R. 0054).

[9] Standing Appeals Committee, Dean Daniels, Vol. I, pages 181-183; Exhibit C, Supp.R. 0115.

[10] Dr. Crapanzano's testimony, Ad Hoc Committee hearing, Vol. I, page 358; (Sealed Exhibit A to Doc. # 393).

co-managed the patients under review in the EJGH proceeding.[11] On February 7, 1995, Dr. Elkins had a meeting with Dr. Pastorek which Dr. Pastorek secretly tape-recorded. Citing a portion of that conversation, which transcript Dr. Pastorek introduced into the record of these proceedings, Dr. Pastorek alleged in his amended complaint that "Dr. Elkins threatened [him] with retaliation via termination procedures if [he] did not give false and/or misleading testimony in a peer review proceeding . . . ."[12]

After reviewing Dr. Pastorek's transcript of that conversation, the District Court dismissed his First Amendment claim finding as follows:

> Dr. Pastorek's free speech claim is refuted by the evidence presented by him in support of the claim. The transcript of the February 1995 telephone conversation between Dr. Elkins and Dr. Pastorek, secretly recorded by Dr. Pastorek, shows that Dr. Elkins discussed the ongoing trouble presented by Dr. Pastorek's prior documented support of Dr. Blanchard's marginal medical practices, and that Dr. Elkins asked if Dr. Pastorek thought Dr. Blanchard could be persuaded to admit her mistakes and accept some kind of probationary status. Dr. Elkins also urged that Dr. Pastorek reassess his support of Dr. Blanchard's practices and to concede that his support for her was "misguided" in light of the potential risks to LSU and to Dr. Pastorek's own

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[11] Exhibit O (Supp.R. 0147); Dr. Pastorek's deposition of 1/18/99; pages 239, 240; Exhibit P, *in globo;* Supp.R. 0150.

[12] Plaintiff's Amended Complaint, ¶ 11.

> career and reputation. There is no support for the claim that Dr. Elkins asked Dr. Pastorek to "fabricate testimony."

App. 21.

Thus, the only evidence Dr. Pastorek presented in support of his First Amendment claim was flatly rejected by the District Court as providing "no support" for that claim.

In February of 1995, Dr. Elkins learned that Dr. Pastorek had recently consulted an additional fifteen (15) patients of Dr. Blanchard's despite Dr. Elkin's directives. Dr. Elkins, at the direction of Dean Daniels, again demanded that Dr. Pastorek resign from the LSU faculty or face termination proceedings. When Pastorek again refused, Drs. Elkins and Gabert commenced the faculty termination proceedings.

Dr. Pastorek alleges that he was terminated for refusing to "recant" his consultations for Dr. Blanchard at the EJGH peer review hearings, which Dr. Pastorek mischaracterizes as a "state hearing tribunal." However, the record is clear that Dr. Pastorek's perinatal consultation in support of Dr. Blanchard's financially-motivated, substandard medical practices was the actual reason for the charge letter authored by Drs. Elkins and Gabert which initiated the faculty termination process. Dr. Pastorek was terminated from LSU after extensive and exhaustive proceedings (lasting more than 2 years) established that his consultations for Dr. Blanchard were below acceptable standards of care.

It is uncontroverted that Dr. Pastorek kept completely secret from LSU his involvement as a co-author of

a manuscript generated by a "Research and Development Agreement" between Dr. Blanchard and Healthdyne Perinatal Services, yet another HUAM and terbutaline pump provider.[13] Dr. Pastorek admitted that he was aware that Dr. Blanchard was to receive compensation for the Healthdyne research agreement.[14] Neither Dr. Blanchard nor Dr. Pastorek ever disclosed to LSU, EJGH or the patients enrolled ~~in the~~ purported "study" the existence of the research agreement with Healthdyne.[15] Dr. Pastorek never exposed to professional scrutiny his alleged "true opinion" regarding the "early and aggressive use" of the terbutaline pump or the use of such expensive equipment as a "first line therapy." The Perinatology Department at LSU was unanimous in its criticism of Dr. Blanchard's harmful medical practices, which Dr. Pastorek's consultations made possible. Dr. Pastorek was properly terminated from LSU for his role in providing eighteen substandard perinatal consultations for Dr. Blanchard.[16]

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[13] Dr. Pastorek's deposition of 1/18/99, page 207, line 22 & page 208, line 12; Exhibit P, *in globo;* Supp.R. 0150.

[14] Dr. Pastorek's deposition of 1/18/99, page 175, line 5-page 178, line 3; Exhibit P, *in globo;* Supp.R. 0150.

[15] Exhibit Y, Supp.R. 0187; Dr. Pastorek's deposition of 1/18/99, page 207, line 22; Exhibit P, *in globo;* Supp.R. 0150.

[16] ACOG Report, pages 5 & 6; Sealed Exhibit 11 to Doc. # 397, R. 0324.

Reason I.

THE WRIT SHOULD BE DENIED BECAUSE PETITIONER WAS NOT TERMINATED FOR ANY ISSUE INVOLVING SPEECH, BUT RATHER FOR CONDUCT INVOLVING SUBSTANDARD MEDICAL PRACTICE

Petitioner seeks to characterize his position as a challenge to his First Amendment freedom of speech. It is not speech which is at issue here but rather, it is *conduct* – the practice of medicine upon real women, with real babies, in real situations which LSU has sought to regulate.

LSU reviewed nineteen specific cases called to its attention by Dr. Elkins as department chairman. It was this laborious review by an *ad hoc* committee, by Dr. Gary Cunningham, an independent expert consultant, and by a panel of ACOG's experts which determined that petitioner's *practice*, not his speech, was substandard.

Respondents respectfully suggest that this petition does not raise any free speech issue recognized by *Connick v. Meyers;* 461 U.S. 138 (1983). Free speech cases addressed by the Court invariably involve instances in which a person's government employment is terminated as a direct result of conversation, usually involving criticism of the employment or the supervision. See *Waters v. Churchill,* 511 U.S. 661 (1994); *Pickering v. Board of Education,* 391 U.S. 563 (1988).

The record of the matter at bar reflects that Dr. Pastorek was not fired for any speech-related activity. The district court found that the complaint filed against Dr. Pastorek by Drs. Elkins and Gabert recommended termination proceedings to determine whether Dr. Pastorek

had engaged in conduct detrimental to his professional responsibilities on several grounds relating to his consultations for Dr. Blanchard. The complaint involved his failure to observe acceptable standards of medical practice.

The district court specifically found that Chancellor Trail's actions in terminating Dr. Pastorek's employment were not arbitrary, capricious, or taken without professional judgment. App. 39-40. In addressing the substantive due process claims brought by petitioner, the district court reviewed the record and made its conclusions based upon the fact that experts in obstetrical practice, Dr. Gary Cunningham and the ACOG panel, were both critical of Pastorek's consultative practice.

The state has a legitimate interest, through continuing supervision, in maintaining the quality of medical care provided within its facilities. *Bigelow v. Virginia*, 421 U.S. 809 (1975). See also, *Darlak v. Bobear*, 824 F.2d 1055 (5th Cir. 1987). This Court has long recognized that the state does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490 (1949); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978).

The Fifth Circuit has recognized that reasonable restraints on the practice of medicine and professional action cannot be defeated by merely pointing to the fact that some communication is involved. *Daly v. Sprague*, 742 F.2d 896 (5th Cir. 1984). It appears beyond dispute that a state operated medical facility has the right, and indeed the duty, to regulate the conduct of its physicians

and limitations on professional medical conduct in the treatment of patients may necessarily affect the use of language. Reasonable restraints on the practice of medicine cannot be defeated by pointing to the fact that communication is involved. *Garcia v. Texas State Board of Medical Examiners*, 384 F. Supp. 434 (W.D. Tex. 1974), *affirmed*, 421 U.S. 995 (1975).

The circuit court found here that Dr. Pastorek was terminated because of his performance as a physician and any speech that may have been affected was incidental to the valid and reasonable regulation of his conduct as a physician. Both lower courts found sufficient evidence of adequate justification for Pastorek's termination based on his substandard practice in treating patients seen in consultation for Dr. Blanchard.

Neither of the courts below found, as Dr. Pastorek would have this court believe, that he was terminated because of any appearance or lack of appearance before EJGH. Dr. Pastorek was discharged by the Chancellor as a result of an extensive and thoughtful review of his practice as a consulting physician. There is absolutely no evidence to support a conclusion that Pastorek's speech, or lack of speech, before a third party hospital reviewing the privileges of Dr. Blanchard had any bearing on the reason for Pastorek's termination from LSU's faculty.

Reason II.

THE WRIT SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT DID NOT HOLD THAT QUALIFIED IMMUNITY APPLIES TO A REQUEST FOR INJUNCTIVE RELIEF

The Fifth Circuit did not hold, as petitioner suggests, that qualified immunity bars petitioner's request for injunctive relief. Instead, the Fifth Circuit found that defendants did not violate any of petitioner's constitutional rights in terminating his employment. App. 7. Without a showing of unconstitutional conduct, the individual defendants were entitled to the dismissal of petitioner's claims against them for damages in their personal capacities (under the doctrine of qualified immunity), as well as to the dismissal of petitioner's claim for injunctive relief. Without a constitutional violation, there was simply no conduct to enjoin.

Petitioner sought injunctive relief (*i.e.*, reinstatement) against Trail in his official capacity and against the Board of Supervisors. Injunctive relief against the Board of Supervisors, a state agency, was properly denied on the basis of Eleventh Amendment immunity.[17] *Cory v. White*, 457 U.S. 85, 91 (1982). Trail defended on the grounds that he had not violated petitioner's constitutional rights and, thus, petitioner's claims against him for damages in his personal capacity and for injunctive relief in his official capacity should be dismissed.

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[17] Petitioner has not sought review of the Board's dismissal.

In analyzing whether the individual defendants were entitled to qualified immunity on the personal capacity claims,[18] the Fifth Circuit first looked to whether petitioner had sufficiently alleged a violation of his constitutional rights.[19] The Fifth Circuit analyzed the merits of each of petitioner's alleged constitutional violations: (1) procedural due process; (2) substantive due process; (3) free speech; and (4) conspiracy to violate civil rights, and found each to be lacking in merit. App. 8-13. As a result, there was no need to reach the issue of whether the constitutional rights alleged were "clearly established" or whether defendants' conduct was "objectively reasonable." As succinctly stated by the District Court, petitioner's failure to prove a constitutional violation, not the application of qualified immunity, defeated his claims:

> In the present case, after discovery and after considering the plaintiff's summary judgment evidence, there simply is no evidence material to any constitutional violation. Thus, the case can be dismissed without addressing whether the law allegedly violated was "clearly established" or whether the defendant's conduct was "objectively reasonable" in light of the law.

App. 24.

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[18] Petitioner sued Elkins for damages in his personal capacity but not for injunctive relief.

[19] In *Siegert v. Gilley*, 500 U.S. 226, 231 (1991), this Court emphasized that the threshold inquiry in a qualified immunity analysis is whether the plaintiff has sufficiently alleged the violation of a clearly established constitutional right.

The Fifth Circuit correctly concluded its qualified immunity analysis once it determined that defendants had not violated any of petitioner's constitutional rights. That finding necessarily barred petitioner's claim for injunctive relief.[20] Accordingly, review by this Court is unnecessary.

Reason III.

THE HOLDING IN *MONELL V. DEPARTMENT OF SOCIAL SERVICES*, 436 U.S. 658 (1978), THAT COMMON LAW PRINCIPLES OF *RESPONDEAT SUPERIOR* DO NOT APPLY TO ACTIONS UNDER 42 U.S.C. § 1983, IS NOT AT ISSUE IN THIS CASE, BUT IS NONETHELESS VALID

In *Monell v. Department of Social Services*, 436 U.S. 658, 692 (1978), this Court held that the doctrine of *respondeat superior* liability is inapplicable in § 1983 civil rights actions. This Court should deny petitioner's request to overrule *Monell* if for no other reason than because such a reversal would not affect the outcome of this case. Petitioner argues that Chancellor Trail should be held liable under the theory of *respondeat superior* for the alleged First Amendment retaliatory motive of Elkins. Any such claim for *respondeat superior* liability would have to be brought against Trail, a state employee, in his official

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[20] Obviously, the result would be different if the Fifth Circuit had found that defendants had violated petitioner's clearly established constitutional rights, but their conduct was objectionably reasonable. Under that scenario, qualified immunity would have precluded petitioner's claim for damages against the individual defendants in their personal capacities but not his claim for injunctive relief.

capacity. However, in *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989), this Court held that a state employee acting in his official capacity is not a "person" subject to liability under § 1983. Thus, the only possible claim under petitioner's theory of *respondeat superior* liability would be one for injunctive relief against Trail. And, as argued above, without a constitutional violation, there can be no claim for injunctive relief. Under these facts, the principle of *respondeat superior* liability is inapplicable.

Irrespective of the foregoing, there are many other obvious reasons why this Court should refuse to overrule the long-standing and often-cited rule in *Monell* that *respondeat superior* liability does not apply in § 1983 actions. This holding is based on the legislative history of § 1983, the plain language of the statute, and constitutional concerns about the nature of *respondeat superior* liability. In addition, this Court has recently considered and rejected an attempt to overrule this fundamental holding of *Monell* in the case of *Board of County Commissioners v. Brown*, 420 U.S. 397 (1997). Finally, despite petitioner's claim to the contrary, 42 U.S.C. § 1988(a) is inapplicable, as federal law is not deficient as to employer liability under § 1983. For all these reasons,

petitioner's invitation to overrule *Monell* is without merit and should not be considered.

The literal language of the statute argues against imposing *respondeat superior* liability. § 1983 allows an action against any "person" who "subjects [a person], or causes [that person] to be subjected," to a deprivation of federal rights. 42 U.S.C. § 1983. This Court correctly determined in *Monell* that this statutory language precluded the application of *respondeat superior* liability, because under this common law theory of strict liability, the employer of the alleged tortfeasor did not "cause" any deprivation of rights. *Monell*, 436 U.S. at 692.

In holding that *respondeat superior* is not applicable to § 1983 civil rights actions, this Court examined the Civil Rights Act of 1871, specifically the Sherman Amendment, which attempted to impose vicarious liability on municipalities for the acts of its citizens. *Id.* at 692, n.57. The defeat of the only amendment to § 1983 and its predecessors that concerned vicarious liability allowed this Court to conclude that there was a strong inference against imposing other forms of vicarious liability, including the state doctrine of *respondeat superior*.

In addition, this Court was correctly concerned about the constitutionality of the *respondeat superior* doctrine. There were, and still are, concerns that *respondeat superior* liability is unconstitutional because it holds a person liable based solely on their relationship with another. *Id.* at 693. This Court held that these concerns led to the defeat of the Sherman Amendment and Congress's use of statutory language precluding the doctrine. *Id.* at 693-94. Therefore, for sound statutory and policy reasons, all of

which remain valid, this Court properly found that *respondeat superior* liability was unavailable in § 1983 actions.

Finally, 42 U.S.C. § 1988(a) is inapplicable because, as explained above, the language of § 1983 adequately addresses the issue of employer liability. The purpose of 42 U.S.C. § 1988(a) is to apply state law as a gap-filler where federal law is silent. The only two cases cited by petitioner on this issue applied state law only because federal law was completely silent on the issue. However, in *Wilson v. Garcia*, 471 U.S. 261, 269 (1985), this Court noted that § 1988 holds that "state law shall only apply 'so far as the same is not inconsistent with' federal law." In this case, federal law is not silent and the application of *respondeat superior* liability would be inconsistent with statutory interpretation precluding this doctrine. Any reversal of this landmark holding would open the floodgates to unfounded liability for governmental entities that are already overburdened and underfunded. Petitioner's request for reversal of the *Monell* holding should be denied.

CONCLUSION

Respondents respectfully suggest that this case involves no issue upon which the Court should grant a writ of certiorari.

Respectfully submitted,

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